IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6752 of 1999
WITH
SPECIAL CIVIL APPLICATION NOS.6836, 6845, 6852
AND 7822 OF 1999

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KESHOD NAGAR PALIKA

Versus

PANKAJGIRI JAVERGIRI MEGHNATHI

Appearance:
MS YAMINI J DESAI for Petitioner
MR B.A. VAISHNAV, And MR MH RATHOD with
MR PRABHAKAR RAO for Respondents

CORAM : MR.JUSTICE Y.B.BHATT
Date of decision: 25/01/2000

COMMON ORAL JUDGEMENT

1. Heard the learned counsel for the respective parties.

2. Learned counsel for the parties agree that

although these petitions arise from separate awards, the factual contentions, pleadings and evidence are substantially common and the same can, therefore, be dealt with by common judgement and order. Accordingly these petitions are disposed of by common judgement.

3. These are petitions under Article 227 of the Constitution of India though styled as ones under Articles 14, 16, 226 and 227 of the Constitution, challenging therein the judgement and awards of the Labour Court wherein the References of the concerned workman have been allowed and the petitioner-employer has been directed to reinstate the concerned workman with full backwages with continuity of service.

4. Before proceeding further on the merits of the matter it is desirable to keep in mind the observations of the Supreme Court in the case of Mohmmad Yunus Vs. Mohammad Mustaqim (AIR 1984 SC 38) and Khali Ahmed Bashir Vs. Tufelhussein S. Sarangpurwala (AIR 1988 SC 184), on the question of the scope and ambit of the jurisdiction of this Court in the context of the powers which this Court may exercise under Article 227 of the Constitution. The Supreme Court has observed in the aforesaid two cases that the High Court, while examining a petition under Article 227 of the Constitution of India, cannot reappreciate the evidence and cannot disturb the findings of fact recorded by the courts below except where the same are perverse, and even errors of law cannot be corrected.

5. On the facts of the case, so far as Special Civil Application No.6752/99 is concerned, a special and particular contention has been raised on the facts of the case to the effect that the respondent workman was not a "workman" within the meaning of section 2(s) of the Industrial Disputes Act.

5.1 There is no dispute that the respondent workman was appointed to the post of Fitter (Technical-Supervisor), that his monthly emoluments were Rs.2500/-, and that this appointment was on an adhoc basis.

5.2 In order to substantiate the contention that the respondent in this petition was not a workman, learned counsel for the petitioner, after referring to the definition of section 2(s) and particularly clause (iv) thereof, sought to contend that since his monthly emoluments were in excess of Rs.1600/-, he would be outside the scope of the definition. What the learned

counsel for the petitioner fails to note is that on a plain reading of clause (iv) it is obvious that the same imposes two conditions, and both the conditions must be simultaneously satisfied, in order that the person concerned should be excluded from the definition. The first condition is that his wages should exceed Rs.1600/per month, and secondly, he should be employed in a supervisory capacity, and exercises his functions mainly of a managerial nature. In this context, although the workman was drawing wages in excess of Rs.1600, it is nowhere the case made out nor established from evidence that he was engaged wherein the nature of his duties were of a "supervisory capacity" or that the nature of his duties were such and/or the functions attached to his post were "functions mainly of a managerial nature". In this context, it must be observed that although the petitioner has pleaded by way of its written statement before the Labour Court that this employee was not a workman within the meaning of the said provision, it has nowhere pleaded let alone proved, that he was an "employee in a supervisory capacity" or that his duties were "mainly of the managerial nature".

5.3 In continuation of the aforesaid submission, learned counsel for the petitioner sought to submit that it is an admitted fact that he was appointed on the post of Fitter (Technical-Supervisor) and this itself indicates that his duties were of supervisory nature. What the learned counsel for the petitioner clearly fails to distinguish is that the nomenclature of the post cannot possibly be deemed to be, or amount to proof, of the nature of the work to be done by him, or the nature of the duties of the workman. Unless it is specifically pleaded and proved, and established by appropriate evidence on record that the concerned employee was "an employee in a supervisory capacity", and/or he was engaged in functions "mainly of a managerial nature", he cannot be excluded from the definition of a workman. This contention must, therefore, fail. It may be noted that this contention arises only in the context of Special Civil Application No.6752/99.

6. The other contention raised by learned counsel for the petitioner applies to all the present petitions, to the effect that the concerned employee had not completed 240 days in service, and that, therefore, there could not be any question of violation of section 25-F of the Industrial Disputes Act. In this context, looking to the nature of the contentions raised by the learned counsel for the petitioners, it would be desirable to bear in mind the pleadings of the parties and the

evidence led by each of them. The employee had specifically pleaded in his claim statement that he had put in more than 240 days of service, and it comes out from the deposition of the employee, at least in the first petition that he had put in "16 months continuous service". On this evidence there cannot be any doubt that the case asserted by the employee and proved (at least on a prima facie basis) is that he had put in more than 240 days of service.

6.1 As against this case of the employee, the pleadings of the employer by way of written statement at Exh.4 are vague and general in nature. The employer in his written statement has merely denied the assertions made by the claimants in the claim statement and has merely denied that the employer has violated section 25-F of the Industrial Disputes Act. Even a careful perusal of the said written statement fails to disclose any specific denial on the part of the employer that the employee had put in 240 days of service, or had put in service of less than 240 days. In the light of this state of the pleadings on the part of the employer, strictly and technically speaking, the employer could not have led any evidence and could not have been permitted to lead any evidence as to whether the workman had put in less than 240 days of service. However, I do not propose to be hyper-technical on the rules of evidence. Once it is found that the parties are ad idem on the controversy and have joined the issue, it may be open to both the parties to lead relevant evidence to support their rival contentions. In the context of the present case it is found that the employee has asserted and proved by appropriate evidence on record that he had put in more than 240 days of service, whereas on the other hand the employer, apart from putting up a contrary case to the workman in the workman's cross examination, has not led any independent evidence to show that the workman had put in less than 240 days.It would be pertinent to remember that the workman had asserted, and in fact it was brought out in the cross-examination of the workman, that he had put in "16 months continuous service". This would establish on evidence the claimant's case of having put in more than 240 days. This evidence, unless rebutted by the employer must be held to have established the workman's case.

6.2 At this juncture it would be relevant to bear in mind the distinction between burden of proof and the onus of proof, as discussed by the Supreme Court in a number of cases. It is not necessary to discuss in detail all such decisions except to note that on the facts of the

case the burden of proof is certainly on the workman to establish that he had put in more than 240 days. However, as found on the facts of the case, once he establishes his case by positive evidence, the onus of proof shifts on the employer, which the employer may discharge by leading contrary evidence by way of rebuttal. It is here that the employer has failed. Suffice it to say that there is no reliable oral and/or documentary evidence brought on record by the employer to rebut the evidence led by the workman. In this context it may be observed that the Labour Court has merely noted, in the context of a decision of the Bombay High Court that where the employer fails to produce relevant documentary evidence in the nature of muster rolls or otherwise (where the issue is of a workman having put in 240 days or otherwise), then it must be accepted that the workman has in fact put in more than 240 days.This principle is also unexceptionable for the simple reason that the employer is in possession of the best available evidence viz., the documentary evidence pertaining to the attendance record of its own employee. If the employer chooses not to produce such evidence, whether by way of original evidence in support of its positive pleadings or even by way of a rebuttal to the evidence led by the employee, then an adverse inference may be drawn. Learned counsel for the petitioner has contended that the workman had not given any notice of production or demanded the production of attendance record or other relevant records. This is neither here nor there for the simple reason that if the workman had issued a notice of production or made a demand for such production, and if such demand had not been complied with by the employer, then an adverse inference should be drawn against the employer. The only distinction is that the failure to comply with the demand for production must lead to an adverse inference, whereas on the other hand, failure to produce the best possible evidence which is in possession of the employer may justify drawing an adverse inference. I may, however, point out that on the facts of the case the Labour Court has chosen not to draw an adverse inference, but has merely made an observation to the effect that the employer has failed to produce such records.

6.3 On the facts and circumstances of the case, therefore, I fail to appreciate how the Labour Court could have interpreted the evidence otherwise than it has done.

6.4 Learned counsel for the petitioner has sought to rely upon a decision of the Single Judge of this Court in

the case of Executive Engineer, Una Irrigation Project Division Vs. Rajniben Prabatbhai, reported at 1997(1) GLH page 750. In the said decision the Court has observed that where it is a question of termination of a daily wager, and a question of violation of section 25-F of the I.D. Act, it is for the workman to prove or it must be evident from the record, that he was in continuous service as per sub-section (1) of section 25-B or that he has actually worked for 240 days and that in this context, the Labour Court must record a clear finding that the workman was in continuous service of more than 240 days. On the facts of the case it cannot possibly be disputed that the Labour Court has in fact recorded such a finding. What must be appreciated is that the contention of the learned counsel for the petitioners is that the finding is incorrect and/or that the finding is not justified on the evidence on record. This is an entirely different proposition altogether. Merely by contending that the evidence on record does not justify a finding is merely questioning the appreciation of evidence on record, which is beyond the scope of a petition under Article 227 of the Constitution of India. However, it cannot possibly be disputed that the Labour Court has, after appreciating the facts brought on record before it, has recorded a clear-cut finding that the workman had put in more than 240 days of service.

6.4 Learned counsel for the petitioner also sought to rely upon another decision of the Single Judge of this Court in the case of Kana Ruda Bharvad Vs. Gujarat W.W. & S. Board, reported at 1997(1) GLH page 190. In this context learned counsel for the petitioners seeks to rely upon the observations made in para 9 of the said decision.

6.5 Firstly it is required to be noted that the observations made in para 9 are merely obiter dicta inasmuch as the court was not dealing with on merits the findings recorded by the Labour Court at all. In fact the High Court in that case was dealing with a petition under Article 226 of the Constitution, which straightaway challenged the order passed by the employer, and wherein no reference was filed under the Industrial Disputes Act. Thus, the observations made in para 9 of the judgement must be seen in the context of the facts of that case and, as the latter portion of the said paragraph indicates, "in the petition under Article 226 of the Constitution if a fact is in dispute, then this Court will not make an inquiry and the petition deserves to be dismissed on this ground. As the petitioner has failed to make out any case of his working for 240 days in the

twelve calendar months preceding the date of termination of his services, the challenge to the order of termination on the ground of violation of provisions of Section 25-F of I.D. Act, 1947 is not sustainable". It is, therefore, pertinent to note that these are general observations of the Court in the context of disputed questions of fact which the High Court refused to entertain and decide in a petition under Article 226. In any case, even this decision does not lay down any proposition of law to the effect that even if the workman establishes (from the evidence brought on record by him) the fact that he had put in more than 240 days of service, this evidence does not require to be rebutted by the employer by leading evidence to the contrary.

7. In the premises aforesaid, I find that there is no substance in the present petitions and the same are, therefore, summarily dismissed. Notices stand discharged (where issued) and ad interim relief vacated (where it had been granted).

******

ar